Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries	)	MB Docket No. 19-177
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JOINT REPLY COMMENTS OF THE STATE BROADCASTERS ASSOCIATIONS

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico

Broadcasters Association, The New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the "State Associations") by their attorneys in the matter, hereby file these Joint Reply Comments in the above-captioned proceeding.[1]

SUMMARY AND INTRODUCTION

The FCC's goal of preventing discrimination in broadcast employment is a noble and important one, and the State Associations have noted their support for it on numerous occasions.[2] Indeed, broadcasters as an industry have been strong supporters of this goal (if not always of the Commission's chosen methods), as reflected in the NAB's Comments describing the many initiatives undertaken by broadcasters to attract minority and female applicants to the broadcast

[1] *See Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, Notice of Proposed Rulemaking, MB Docket No. 19-177, 34 FCC Rcd 5358 (2019) (hereinafter *NPRM*).

[2] *See, e.g.*, Joint Reply Comments of the Named State Broadcasters Associations in MM Docket No. 98-204 (filed May 29, 2002); Joint Comments of the Named State Broadcasters Associations in MM Docket No. 98-204 (filed April 15, 2002).

industry.[3] That perhaps explains why the FCC, as far as the State Associations can determine, has not found a single broadcaster to have engaged in discrimination since the advent of the first EEO rule in 1969.[4]

Because of that important fact, along with court decisions invalidating the two prior iterations of the EEO rule as unconstitutionally intrusive, the current iteration of Section 73.2080 (the "EEO Rule")[5] has focused on procedural requirements to promote broad employment outreach, associated with paperwork requirements intended to demonstrate that the station has both scrupulously adhered to those procedures and documented its efforts to accomplish them. It is here where disagreements arise, as the FCC seeks to balance a laudable goal against many other competing considerations, some of them constitutional in nature, and not the least of which is the reality of operating a broadcast station with an ever-broadening array of audio and video competitors that lack the regulatory obligations of a broadcaster.

As noted above, the EEO Rule is unusual in that it imposes this "regulatory overhead" without any evidence of actual past discrimination on the part of the broadcaster. As a result, no

[3] *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, Comments of the National Association of Broadcasters in Response to Notice of Proposed Rulemaking, MB Docket No. 19-177 (filed Sept. 20, 2019) (hereinafter *NAB Comments*) at 11-13.

[4] As evidence of the need for a more expansive EEO Rule, the EEO Supporters point to *Southland Television Co.*, 10 RR 699, *recon. denied*, 20 FCC 159 (**1955**), *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. **1966**), and *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. **1969**), all of which were adjudicated and based on conduct that predated the Commission's adoption of its first EEO rule in 1969. *See Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, Comments of the EEO Supporters in Response to Notice of Proposed Rulemaking, MB Docket No. 19-177 (filed Sept. 20, 2019) (hereinafter "*EEO Supporters Comments*") at 10 n.24.

[5] 47 C.F.R. § 73.2080 (these Reply Comments refer to the current iteration of the rule as the "EEO Rule").

matter how laudable the goal, the approach taken to reaching it must be narrowly tailored to achieve it.[6] Many of the proposals presented in this proceeding would dramatically increase burdens on broadcasters while at the same time being of both questionable constitutionality and little practical utility in achieving the Commission's stated goals. Imprudently tacking these proposals to the current EEO Rule—a rule that has never been subjected to judicial review—is the equivalent of strapping weights to it and tossing it into the judicial ocean to see if it can survive constitutional scrutiny. Encouraging a court to overturn the entire EEO Rule is a poor strategy for promoting diversity in broadcast employment.

In contrast, as the State Associations proposed in their comments in response to the Commission's Public Notice[7] in the *Media Modernization* proceeding,[8] and as the NAB has proposed in this proceeding, it is possible to significantly reduce regulatory burdens associated with the EEO Rule—both for broadcasters and the Commission's staff—without altering the substance of the rule. That can be accomplished quite simply and quickly by eliminating what has now become clear are repetitive and unproductive random EEO audits. Stations' EEO performance is already reviewed at license renewal and in Mid-Term reviews, and the random EEO audits' main legacy has been to confirm that they are not needed, as they have found a very

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[6] *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 21 ("*MD/DC/DE Broadcasters Association*"), *rehearing denied* 253 F.3d 732 (D.C. Cir 2001), *cert denied sub nom. Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Assoc.*, 534 U.S. 1113 (2002) ("Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future.").

[7] *Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105, 32 FCC Rcd 4406 (2017) (hereinafter *Media Modernization PN*).

[8] *See* Joint Reply Comments of the Named State Broadcasters Associations in Response to Public Notice, MB Docket No. 17-105 (filed Aug. 4, 2017) (hereinafter *State Broadcasters Associations Media Modernization Reply Comments*).

high level of EEO compliance among broadcasters[9] that has been separately confirmed by the FCC's license renewal and Mid-Term EEO reviews.

Thus, in a proceeding whose objective is to determine "whether the agency should make improvements to EEO compliance and enforcement,"[10] eliminating redundancies and inefficiencies that have proven effective only at demonstrating they are not needed is very low hanging fruit. The State Associations therefore file these Reply Comments to urge the Commission to take this opportunity to more narrowly tailor its EEO Rule if it is to avoid (or withstand) a constitutional challenge, while making the rule more cost-effective, and alleviating unnecessary burdens on both broadcasters and FCC staff.

I. THE EEO RULE RESIDES AT THE MARGINS OF CONSTITUTIONALITY

The Commission's current EEO Rule came into being only after the two prior iterations were held unconstitutional by the U.S. Court of Appeals for the District of Columbia Circuit in 1998[11] and 2001,[12] with the U.S. Supreme Court rejecting an effort to appeal the second ruling.[13] The validity of the current EEO Rule has not been assessed by any court, and the DC Circuit has openly and repeatedly questioned whether the FCC has any compelling governmental interest in regulating the employment practices of broadcasters at all, a matter it has never had to reach in invalidating the prior iterations of the FCC's EEO rules. Therefore, prudence dictates that all aspects of any modified EEO rules adopted by the FCC be as "narrowly tailored" as possible,

[9] *NAB Comments* at 8.
[10] *NPRM*, 34 FCC Rcd at 5360.
[11] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 ("*Lutheran Church*"), *rehearing denied* 154 F.3d 487, *rehearing en banc denied* 154 F.3d 494 (D.C. Cir. 1998).
[12] *MD/DC/DE Broadcasters Association*, 236 F.3d 13.
[13] *Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Assoc.*, 534 U.S. 1113 (2002).

lest the courts, given yet another opportunity, declare the current EEO Rule the third and final strike against the FCC's EEO ambitions.

In *Lutheran Church v. FCC*,[14] the DC Circuit held that the FCC's first iteration of an EEO rule was a race-based regulation and therefore subject to strict scrutiny. The court further found that the Commission's rationale for enacting a race-based rule, diversity in programming, was not a compelling governmental interest that could withstand the strict scrutiny standard of constitutional review.[15] The court remanded the case to the FCC to determine whether the Commission could present a compelling governmental interest in adopting an EEO rule. In so doing, the court specifically stated that its decision was based only on its review of the FCC's EEO program requirements and did not address whether the FCC had any authority to promulgate the non-discrimination provision of the rule.[16]

Indeed, the court noted that the Department of Justice had argued that there were in fact two bases on which the Commission could regulate the employment practices of broadcasters—to foster programming diversity and to prevent employment discrimination.[17] The court eviscerated the second of these bases and suggested that the Commission had relied solely on the programming diversity rationale because the Commission itself knew that, under *NAACP v.*

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[14] 141 F.3d 344, *rehearing denied* 154 F.3d 487, *rehearing en banc denied* 154 F.3d 494 (D.C. Cir. 1998).
[15] *Id.* at 354.
[16] *Id.* at 356 ("To be sure, we have held only that the Commission's EEO program requirements are unconstitutional; therefore, our decision does not reach the Commission's non-discrimination rule which *King's Garden* interprets. *See* 47 C.F.R. § 73.2080(a). But our opinion has undermined the proposition that there is any link between broad employment regulation and the Commission's avowed interest in broadcast diversity. We think, therefore, that the appropriate course is to remand to the FCC so it can determine whether it has authority to promulgate an employment non-discrimination rule.").
[17] *Id.* at 354.

FPC,[18] it did not have authority to implement an EEO rule solely for the purposes of avoiding employment discrimination.[19] In response to a request for rehearing by the Commission, the court reiterated that it had left open the question of whether the Commission could justify even an outreach-only rule (as opposed to the results-oriented rule the court had just found to be an unconstitutional racial quota), stating: "Whether the government can encourage—or even require—an outreach program specifically targeted on minorities is, of course, a question we need not decide."[20]

Following that ruling, the Commission abandoned its reliance on diversity of programming as the sole basis for its authority to regulate broadcast EEO. It instead adopted the elimination of Word of Mouth hiring as a barrier to equal employment in broadcasting as its lead reason for regulating broadcasters' employment practices.[21] The Commission then gave broadcasters two options to demonstrate compliance with its new EEO rule.[22] However, the DC

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[18] *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 670 n.7 (1976).

[19] *Lutheran Church*, 141 F.3d at 354 (citing 47 U.S.C. § 151 and *NAACP v. FPC*, 425 U.S. at 670 n.7) ("The only possible statutory justification for the Commission to regulate workplace discrimination would be its obligation to safeguard the 'public interest,' and the Supreme Court has held that an agency may pass antidiscrimination measures under its public interest authority only insofar as discrimination relates to the agency's specific statutory charge. NAACP v. FPC, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976). Thus the FCC can probably only regulate discrimination that affects 'communication service'—here, that means programming.").

[20] *Lutheran Church v. FCC*, 154 F.3d 487, 492 (D.C. Cir. 1998) (denying rehearing).

[21] *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, 2331 (2000) (hereinafter *2000 EEO Order*).

[22] Under Option A of the post-*Lutheran Church* rule, broadcast stations had to demonstrate that they gave notice of job openings to qualifying organizations requesting them and engaged in a specified number of recruitment activities delineated by the Commission. For a station electing Option A, the Commission would evaluate compliance with the rule based on completion of the specified outreach activities, without regard to the racial make-up of the resulting applicant pool or station work force. Under Option B, broadcast stations had flexibility to design their own

Circuit in *MD/DC/DE Broadcasters Association v. FCC*[23] again found that one of the two compliance options, which required broadcasters to report the race and gender of all applicants resulting from their EEO outreach efforts, constituted a race-based rule that could not withstand strict scrutiny and struck down the entire rule. In so doing, the court pointedly did not reach the question of whether the FCC's new rationale was a compelling governmental interest sufficient to justify use of a race-based rule. Rather, the court found that the rule was not narrowly tailored to the Commission's stated purpose and would therefore fail strict scrutiny review regardless of what purported governmental interest was put forth.[24]

In response to the FCC's request for rehearing of that decision, the court noted that the FCC had set out two goals when it adopted the EEO rule under review—to ensure broad outreach in station recruitment and to afford stations flexibility in complying with the rule.[25] The court said that merely eliminating Option B would leave one of the FCC's stated goals unmet. It went on to say that on remand, the Commission could adopt other measures to accommodate the flexibility goal or the Commission could change its goals.[26] Review of that

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recruitment outreach programs, but the Commission would rely on racial metrics to determine whether the broadcaster's outreach was adequately inclusive. *Id.* at 2364-65.

[23] 236 F.3d 13, *rehearing denied* 253 F.3d 732 (D.C. Cir 2001), *cert denied sub nom. Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Assoc.*, 534 U.S. 1113 (2002).

[24] *Id*. at 21 ("We need not resolve the issue of a compelling governmental interest in preventing discrimination, however, because the Broadcasters argue convincingly that the new EEO rule is not narrowly tailored to further that interest.").

[25] *MD/DC/DE Broadcasters Association v. FCC*, 253 F.3d 732, 736 (2001) (denying rehearing).

[26] *Id.* The Commission later cited this language as indicating the court's acceptance of Commission authority to adopt EEO rules, but as discussed above, the court had already called the Commission's authority into question in *Lutheran Church* and did not reach the question in *MD/DC/DE Broadcasters*. *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies,* Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, 24022 (2002) (hereinafter *2002 EEO Order*).

decision by the U.S. Supreme Court was sought, and the Court rejected that request.[27]

On its third attempt to fashion a viable EEO rule, the FCC tried to squeeze lemonade from the lemons the DC Circuit had handed it. The FCC took the DC Circuit's restraint in declining to reach the issue of whether the FCC had authority to promulgate any EEO Rule as evidence that it in fact does have such authority.[28] It also relied heavily on Congress's ratification of its (unconstitutional) EEO rules during Congress's enactment of the 1984 and 1992 Cable Acts, which predated the *Lutheran Church* decision,[29] and conveniently found that the provision that Congress included in the 1992 Act prohibiting the FCC from changing the EEO rules or forms applicable to broadcast television[30] was not a prohibition on adopting a new and different EEO rule, but an independent grant of congressional authority to adopt and enforce EEO regulations despite the subsequent court holdings in *Lutheran Church* and *MD/DC/DE*

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[27] *Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Assoc.*, 534 U.S. 1113 (2002).

[28] *See 2002 EEO Order*, 17 FCC Rcd at 24022.

[29] *Id.* at 24030-24032.

[30] Limitation on revision of equal employment opportunity regulations

(a) Limitation
Except as specifically provided in this section, *the Commission shall not revise*—
(1) *the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees*; or
(2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.

(b) Midterm review
The Commission shall revise the regulations described in subsection (a) to require a midterm review of television broadcast station licensees' employment practices and to require the Commission to inform such licensees of necessary improvements in recruitment practices identified as a consequence of such review.

(c) Authority to make technical revisions
The Commission may revise the regulations described in subsection (a) to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization.

47 U.S.C. § 334 (*emphasis added*).

Broadcasters.[31] The Commission did not, however, eliminate its previously stated goal of preventing employment discrimination, asserting that:

> The evidence in this proceeding demonstrates an ongoing need to deter discrimination and ensure equal employment opportunity in the broadcasting and MVPD industries. Moreover, Congress has made clear its intention that we should enact EEO rules for the broadcast and MVPD industries.[32]

While noting that the FCC's primary goal was to ensure broad outreach in recruitment, the Commission also indicated that "[w]e seek to do so in a manner that affords some flexibility to affected industries."[33] The final result of these cumulative conclusions was a new EEO Rule, but the questions raised by the courts as to whether the Commission "has authority to promulgate an employment non-discrimination rule"[34] or "can encourage—or even require—an outreach program specifically targeted on minorities"[35] remain unresolved.

Against this backdrop, the Commission has undertaken this rulemaking proceeding. It is doing so in an era in which the Commission has in its *Media Modernization* proceeding identified a new priority, not simply of giving broadcasters flexibility,[36] but of minimizing unnecessary paperwork and regulatory burdens wherever possible.[37] With more than fifteen years' experience in administering the EEO Rule now under its belt, the Commission has already identified and acted on some of the lowest hanging fruit aimed at promoting that goal, including

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[31] *2002 EEO Order*, 17 FCC Rcd at 24032.
[32] *Id.* at 24043.
[33] *Id.*
[34] *Lutheran Church*, 141 F.3d at 356.
[35] *Lutheran Church v. FCC*, 154 F.3d 487, 492 (D.C. Cir. 1998) (denying rehearing).
[36] *2000 EEO Order*, 15 FCC Rcd at 2374.
[37] *See Media Modernization PN*.

eliminating the filing of FCC Form 397, and permitting online-only recruiting.[38] That is an excellent start, but it is important that the FCC continue to root out duplicative and inefficient elements of the Commission's EEO regime, not only to meet the Commission's goal, but to put the EEO Rule on firmer judicial ground.

The State Associations have supported the FCC in seeking to achieve the Commission's current EEO objectives through a more efficient and less burdensome process.[39] The history of broadcasters' nearly universal compliance with the EEO Rule these past 17 years, despite the paperwork burdens involved, demonstrates that stations are meeting the FCC's EEO objectives.[40] However, as the comments of both NAB and the 82 Broadcaster Station Licensees, and even ACA Connect, reflect, there is substantial agreement that the EEO Rule is one of the Commission's most burdensome regulations from a recordkeeping standpoint.[41] Given the resounding record of compliance by broadcasters despite those burdens,[42] the principal reasons to change the EEO Rule would be to apply a lighter touch where a heavy hand is clearly not needed, or to take steps to buttress the rule against judicial review.

Fortunately, these reasons are completely in synch with each other, allowing the Commission to both lighten the regulatory load while making the rule more judicially durable.

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[38] *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, Declaratory Ruling, MB Docket No. 16-410, 32 FCC Rcd 3685 (2017).
[39] *See, e.g., State Broadcasters Associations Media Modernization Reply Comments*.
[40] *See NAB Comments* at 8.
[41] *NAB Comments* at 7; *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, Joint Comments of 82 Broadcast Station Licensees and Petition for Further Notice of Proposed Rulemaking, MB Docket No. 19-177 (filed July 18, 2019) at 7-9; *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, Comments of ACA Connect, MB Docket No. 19-177 (filed September 20, 2019) at 7-8.
[42] *See* Section II, *infra.*

What would be most counterproductive to achieving the Commission's EEO objectives is to adopt proposals that merely increase the burden imposed by the rule, inviting courts to finally resolve the various fundamental questions previously left unanswered regarding the constitutionality of the FCC's EEO regulations.

II. THE COMMISSION SHOULD END RANDOM EEO AUDITS

The EEO Supporters assert in their Comments that the EEO Rule is "[u]nquestionably . . . cost-benefit justified."[43] In supporting elimination of the Form 397, though, MMTC admitted that:

> Form 397 is seldom, if ever, used for EEO enforcement or citizen review of EEO performance. Thus, MMTC does not object to its elimination. It is far more important that the Commission encourage broadcasters to focus their limited resources on broad recruitment and outreach, including outreach to diverse job recruitment sources in their communities.[44]

In so doing, MMTC acknowledged that the burden imposed on broadcasters for the last 17 years attributable to the Form 397 aspect of the FCC's EEO Rule could not possibly have survived a cost-benefit analysis. In eliminating that burden, the FCC might be seen by a court to have taken a small step towards reasonably tailoring its EEO Rule to its stated objectives. It is now time to take the next step and eliminate an even more burdensome and less productive aspect of the EEO Rule—random EEO Audits.

As noted in the NAB's Comments,[45] every other rule applicable to broadcasters is enforced based upon the FCC's receipt of evidence suggesting that a rule has been violated,

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[43] *EEO Supporters Comments* at 11.
[44] Comments of the Multicultural Media, Telecom and Internet Council in Response to Public Notice, MB Docket No. 17-105 (filed July 5, 2017) (hereinafter *MMTC Media Modernization Comments*) at 19.
[45] *NAB Comments* at 9.

resulting in an FCC investigation to determine whether a rule violation did in fact occur. Alone among all other broadcast rules, the EEO Rule is the only rule enforced by random audits. And not just an occasional random audit, but a methodical system of annual audits by the thousands that is so extensive that, as discussed below,[46] when combined with license renewal and Mid-Term reviews, could result in a station having its EEO performance reviewed every other year.

There is no rational basis for implementing such an unusual, repetitive, and burdensome enforcement mechanism for EEO. The incongruity becomes even more apparent when judged against the Commission's rules affecting public safety—such as tower painting and lighting or RF exposure—that today are, like all other broadcast rules save EEO, primarily enforced through complaints received by the FCC. No matter how important one considers the EEO Rule's objectives to be, they are surely not more important than protecting the public from imminent physical harm, and yet human and economic resources that should be spent monitoring and maintaining, for example, tower lighting to protect aircraft, are instead drained at many a station by the need to respond to yet another EEO audit. That is an irrational result when, as the NAB's Comments indicate, more than 15,000 EEO audits conducted over the past 17 years have revealed less than 20 instances of potential EEO violations.[47] The IRS would have long ago shut down its tax audit program had it experienced a similarly high rate of compliance.

Moreover, technology has long since eliminated the need for EEO compliance to be so uniquely and continuously monitored by the FCC itself. If the original concept behind imposing random EEO audits was that a complaint-based system would not work because the public did not have ready access to a station's recruiting and hiring information, that concern has been

[46] *See* Section III.B, *infra.*
[47] *NAB Comments* at 8.

mooted by the advent of the online Public File, which contains all Annual EEO Public File Reports from a station's current license term.

As a result, just like with other FCC rules, the public can readily monitor a station's EEO performance and file a complaint if it believes the station has not been meeting its obligations in that regard. If ever there was anything so unusual about the EEO Rule as to require such a unique and burdensome enforcement mechanism as audits, the public's access to EEO documents in the online Public File has eliminated it.

Finally, the costs imposed by these audits are significant. NAB indicates that anecdotal evidence suggests the cost to respond to an EEO audit letter from the FCC can easily be $3,000-$5,000,[48] and the Public Broadcasters, a coalition of America's Public Television Stations, the Corporation for Public Broadcasting, National Public Radio, Inc., and the Public Broadcasting Service, noted in their Comments in the *Media Modernization* proceeding that its members had to resort to hiring extra staff simply to upload EEO audit responses to the online Public File.[49]

No commenter has submitted any evidence in this proceeding to refute NAB's estimate. Instead, MMTC merely asserts that NAB has not explained "why these (or other, more accurate cost figures) would not be cost-justified in deterring race and gender discrimination in broadcasting."[50] As noted above, audits that are finding a potential EEO Rule violation (with no

[48] *Id.* Based on its own experience, undersigned counsel finds the NAB's estimate to be reasonable for purely outside legal expenses of a small SEU responding to a random EEO audit. Larger SEUs will often have outside legal expenses which exceed $10,000 when responding to a random EEO audit. Of course, neither of these figures takes into account the expenditure of internal station resources when responding to a random EEO audit.

[49] Comments of America's Public Television Stations, Corporation for Public Broadcasting, National Public Radio, Inc. and Public Broadcasting Service in Response to Public Notice, MB Docket No. 17-105 (filed July 5, 2017) at 11 n.18.

[50] Letter from David Honig, President Emeritus and Senior Advisor, MMTC, to Rosemary Harold, Esq., Chief, Enforcement Bureau, FCC, dated October 11, 2019 at n.7.

finding of discrimination) in 00.1% of the stations audited can hardly be said to be useful, much less necessary, to deter race and gender discrimination in broadcasting, particularly where stations' EEO performance is already being regularly assessed through license renewal and Mid-Term EEO reviews.

In addition, MMTC overlooks that the stations being audited not only have to cover their own expenses in responding to audits, but through Regulatory Fees, also have to cover the Commission's costs of conducting those audits. With broadcast Regulatory Fees rising year after year, eliminating inefficiencies in the FCC's enforcement mechanisms is not just wise, but imperative if smaller broadcasters are to survive and prosper. All the good intentions in the world won't improve minority hiring at a station that has been driven out of business by growing costs and increased competition from unregulated entities.

And of course, in discounting the significance of audit costs, MMTC is proceeding under its mistaken assumption that a station will face an audit only once every 20 years. As discussed in Section III.B of these Joint Reply Comments, however, that assumption is based on a flawed understanding of the FCC's audit program, where, in fact, some stations have been audited an average of once every 2.5 to 3 years. Thus, it is not just the cost of one audit that is relevant, but the cost of the multiple audits that a station may face. For these reasons—the repetitive and demonstrably unproductive nature of EEO audits, the drain on both the FCC's and stations' resources in sending, processing, and responding to audit letters, and the technological elimination of any obstacle to the public enforcing EEO Rule compliance in the same manner as every other rule, through complaints—the Commission should eliminate its random EEO audit program. It should instead use the far more efficient enforcement mechanism applied for all other rules, which involves expending the resources of the FCC and the broadcaster to establish

whether a rule violation has occurred only where the Commission has received some indication that a violation has in fact occurred. Absent such evidence, expending resources—its own and the station's—merely diverts those resources from more productive endeavors that serve the public.

III. THE PROPOSALS PUT FORTH BY THE EEO SUPPORTERS AND MMTC ARE NEITHER NARROWLY TAILORED NOR JUSTIFIED BY THE RECORD

In launching this proceeding, the Commission noted that:

> [C]ommenters should explain any initiatives with specificity, supply any data or studies indicating that such proposals would be consistent with the U.S. Constitution and further the Commission goal of nondiscrimination in broadcaster and MVPD employment, and provide suggestions for overcoming any implementation difficulties.[51]

In response, both MMTC and the EEO Supporters have offered a plethora of proposals, but have failed to present data suggesting they are needed, or that the proposals would actually accomplish their stated goals, setting aside whether their stated goals are the Commission's goals. More importantly, in an area where the prior two iterations of the FCC's EEO Rule were found to be clearly unconstitutional, and every aspect of the EEO Rule therefore has constitutional implications, MMTC fails to even mention the Constitution, and the EEO Supporters describe the constitutionality of their numerous proposals with the extraordinary statement that:

> We anticipate that no one will contest that our proposals on the time sequences of job posting and hiring decisions, on the FCC/EEOC MOU, or seeking an inquiry into whether the systemic exclusion of minorities from radio news is caused by racial discrimination, would have any constitutional ramifications. Our proposals on the use of Form 395 data are not constitutionally controversial either, as detailed below.[52]

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[51] *NPRM*, 34 FCC Rcd at 5361.
[52] *EEO Supporters Comments* at 29.

That is an optimistic statement at best, given that the EEO Supporters propose collecting racial and gender data from stations specifically so that it can be used as the determinant factor in deciding which stations are to be punished as "discriminators," and which have enough minority employees to avoid that fate. This is *precisely* the use of such data that the U.S. Court of Appeals has twice found to be unconstitutional. Similarly, to suggest that an FCC investigation of the staffing of "radio news" has no First Amendment implications is simply stunning.

As discussed below, many of the proposals made by MMTC and the EEO Supporters fail to meet the standards outlined by the FCC in launching this proceeding. Equally important, they make an already burdensome EEO Rule even more burdensome, the opposite of creating a more efficient EEO Rule. Moreover, the bulk of these proposals seek to address fictional needs, are not supported by any factual record or logical need, or are already addressed by existing FCC requirements and procedures.[53]

A. The EEO Supporters' Proposal to Collect Employment Profiles From Stations Engaging in Word of Mouth Recruiting Is Per Se Unconstitutional

The EEO Supporters claim that the FCC's audit program cannot "apprehend a discriminator" because it only looks at the issue of whether a station has engaged in Word of Mouth hiring.[54] According to the EEO Supporters, Word of Mouth hiring requires a homogenous staff to be discriminatory, ignoring the fact that the EEO Rule prohibits reliance

[53] Given their quantity, the State Broadcasters Associations do not herein attempt to address all of the proposals suggested in the comments of the EEO Supporters and MMTC, but many of the remaining proposals suffer from the same infirmities as those discussed herein. As a result, the fact that they are not addressed in these comments should not be construed as an indication that the State Broadcasters Associations do not find them objectionable.

[54] *EEO Supporters Comments* at 14-15.

solely on Word of Mouth recruiting regardless of impact.[55] This is an argument previously raised by MMTC in the *Media Modernization* proceeding, where it stated:

> MMTC requests that the Commission stop prosecuting those whose "offense" is recruiting primarily by WOM from a heterogenous staff—a practice that is not discriminatory; and instead (b) [sic] prosecute the "bad apples" who recruit primarily by WOM from a homogenous staff….[56]

Thus, the EEO Supporters propose that the FCC abandon its blanket prohibition on relying solely on Word of Mouth recruiting, and once the FCC has determined that a station has relied solely on Word of Mouth recruiting, require the station to complete and submit a Form 395 detailing the racial and gender breakdown of its staff.[57] From the information submitted on the Form 395, the FCC would then determine whether the station is a discriminator because its staff is homogenous, or not a discriminator because its staff is comprised of some undefined mix of races and genders. The Form 395, then, becomes the arbiter of whether the station has on staff "enough" employees of particular races or genders to not be punished by the FCC. This is the very definition of an unconstitutional racial quota.

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[55] The EEO Supporters present their proposal as being narrowly tailored to remedy past discriminatory activity in that the collection of racial data will be required only of those broadcasters who have been found to have engaged in discriminatory Word of Mouth recruiting: "Only those broadcasters that unlawfully engaged in predominant WOM recruitment would be asked whether they also have a homogeneous staff and, then, may be engaging in an inherently discriminatory recruitment practice. Thus, if there would be 'pressure', it is 'pressure' to obey settled law by recruiting broadly." *EEO Supporters Comments* at 31. But this argument is completely circular because they claim that WOM recruiting is not impermissible in the first instance—it is only impermissible when conducted by a homogenous staff. Therefore, by definition, the Commission cannot target only "discriminators," because the gravamen of the offense is using WOM recruiting while homogeneous, a fact that the FCC would not know when demanding the station submit the racial/gender breakdown of its staff.

[56] *MMTC Media Modernization Comments* at 19.

[57] *EEO Supporters Comments* at 16.

As the courts noted in striking down the FCC's earlier EEO rules, "[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit."[58] Thus, it is clear that any prudent broadcaster would desire to avoid trouble with the FCC by "mak[ing] race-based hiring decisions"[59] with the goal of both earning and retaining that chit. Indeed, the reasonable broadcaster would likely view the Commission's adoption of such a proposal as "evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them."[60] This disparate treatment of broadcasters based on the racial and gender composition of their staff would not only be a race-based rule subject to strict scrutiny in court, but is precisely the type of "quota-based" approach to EEO that was struck down in both *Lutheran Church* and *MD/DC/DE Broadcasters Association* as blatantly unconstitutional.[61]

B. MMTC's Proposal to Increase the Number of EEO Audits Is Based on a Fundamental Misunderstanding of the FCC's Audit Procedures

MMTC claims that, at a rate of 5% of stations per year, the FCC will audit a broadcast station only once every 20 years, and that the number of audits should be doubled (presumably to ensure stations are audited once every 10 years).[62] MMTC's assertion, however, overlooks the fact that the FCC's EEO audit letters require licensees to provide information regarding not just

[58] *Lutheran Church*, 141 F.3d at 353.
[59] *Id.* at 354.
[60] *MD/DC/DE Broadcasters*, 236 F.3d at 19.
[61] *See, e.g.*, *MD/DC/DE Broadcasters Association*, 236 F.3d at 21 ("Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future.").
[62] Letter from David Honig, President Emeritus and Senior Advisor, MMTC, to Rosemary Harold, Esq., Chief, Enforcement Bureau, FCC, dated September 3, 2019 at 3.

the station receiving the audit letter, but all stations in that Station Employment Unit ("SEU").[63] Because the vast majority of stations are in SEUs containing multiple stations, a far higher percentage of broadcast stations are audited each year than the 5% suggested by MMTC. For example, if we conservatively assume the average radio SEU consists of three stations, that means that when the FCC sends audit letters to 5% of stations each year, **15%** of stations are actually audited that year. Thus the average radio station will face an audit not once every twenty years, but once every 6.7 years, which translates to an average of at least one, and sometimes two, EEO audits during each station's eight-year license term. That is in addition to the EEO reviews conducted by the FCC at license renewal and at Mid-Term.

This straightforward math reveals that a station will not have its EEO performance evaluated once every twenty years, but three to four times *during each eight-year license term*. This math is borne out by examining the Commission's own EEO audit lists. In the Commission's most recent audit of television SEUs conducted in February of 2019, the FCC addressed EEO audit letters to **84** television stations, which tend to have smaller SEUs than radio stations. Despite that, an examination of EEO audit responses from those stations reveals that the audits actually encompassed **201** television, Class A television, LPTV, and AM and FM radio stations.[64]

A further examination reveals that some of these stations have been audited *five or six times* in the fifteen years since audits began in 2004, averaging an EEO audit every 2.5 to 3

[63] *Media Bureau Commences 2019 EEO Audits*, Public Notice, 34 FCC Rcd 377, 378 (2019) ("In accordance with 47 C.F.R. § 73.2080 (f)(4), the station employment unit (the Unit) that includes your above-referenced station (the Station) has been randomly selected for an audit of its Equal Employment Opportunity program.").
[64] *Id.* at 382-86.

years.[65] This is *in addition to* the two EEO reviews at license renewal and the two EEO Mid-Term reviews these stations would likely have undergone in that 15-year period. When a station is having its EEO performance reviewed *nine or ten times* in a fifteen year period (averaging a review every 18 to 20 months), it is clear that EEO audits are imposing an enormous burden on these stations, and accomplishing nothing that wouldn't already be addressed in license renewal and Mid-Term EEO reviews. Clearly the cost-benefit train has gone off the tracks with regard to EEO audits, and doubling the number of audits (with the result that some stations would apparently get audited every nine months) would be ridiculously burdensome and unproductive.

These repetitive EEO reviews are not just burdensome and costly, but as indicated by the rarity of problems found despite an immense number of stations being audited,[66] are not an efficient use of either the Commission's or the station's resources. As a result, MMTC's proposal to increase the number of audit letters sent each year from 5% of stations to 10% of stations merely doubles down on a unproductive use of Commission resources. Even if that were not the case, however, MMTC's failure to acknowledge that audits are done on an SEU basis rather than a station by station basis means that the FCC has already granted MMTC's wish and then some, with some 15% of stations being audited each year rather than the 10% MMTC seeks. The FCC would actually have to *reduce* the number of audit letters sent each year to get down to the number MMTC has suggested is optimal. MMTC's claim that more EEO audits are needed simply doesn't square with the facts.

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[65] *See, e.g.*, KLWB(TV), New Iberia, LA (randomly selected six times between 2007 and 2019); KMPX(TV), Decatur, TX (randomly selected five times between 2007 and 2019); KTUZ-TV, Shawnee, OK (randomly selected four times between 2010 and 2019); WSOC-TV, Charlotte, NC (randomly selected four times between 2010 and 2019).

[66] *NAB Comments* at 8.

C. There Is No Factual or Logical Basis for Adding More Intrusive EEO Audits

Similarly lacking any factual predicate is MMTC's proposal that the FCC subject broadcasters to "thorough, on-site reviews to ensure nondiscrimination at the points of interviewing and employee selection."[67] First, there is no evidence to suggest that the procedures MMTC proposes are needed as, in thousands upon thousands of EEO reviews by the Commission's highly capable and experienced EEO staff, no finding has ever been made that discrimination has in fact occurred. MMTC's response to that simple fact is nothing more than circular logic—suggesting discrimination hasn't been found because the FCC hasn't been doing such on-site reviews. No sound policymaking can be based on such fallacious reasoning, which could be deployed to support any proposal under the sun, no matter how baseless.

Second, MMTC presents no rationale for how such "visits" would reveal any useful information even if there were a problem to be discovered. Unless the FCC bursts in unannounced during an employment interview, it is hard to see how this intense use of Commission resources would actually ensure nondiscrimination. Will this involve Commission employees listening in on interviews and judging the interviewer's style and questions? Will the FCC be in the room when the ultimate decision on whom to hire is made? If they are not, it is not clear how these resource-intensive audits will enhance nondiscrimination, and if they are, then this proposal would be the very definition of one that is not "narrowly tailored."

In that regard, it is unimaginable that the courts, already concerned about the Commission intruding upon employment decisions under the guise of pursuing EEO objectives, would not overturn any rule facilitating such intrusive government conduct. As the EEO

[67] Letter from David Honig, President Emeritus and Senior Advisor, MMTC, to Rosemary Harold, Esq., Chief, Enforcement Bureau, FCC, dated September 3, 2019 at 3.

Supporters note, "it is unsound economic policy to exclude or drive out anyone on a basis other than merit,"[68] but what sane broadcaster is going to disregard race and gender when selecting the most meritorious candidate where it is clear which applicant you should pick if you want the visiting "EEO inspector" to give you a clean bill of health with the FCC? That is the very pressure to "make race-based hiring decisions"[69] that the courts rejected in invalidating the EEO Rule's predecessors.

And all of this ignores the fact that many small station employment units can go years without hiring a single full-time employee. How many months or years is the FCC intending to "embed" an employee with a station while waiting for a job opening? Stated differently, the only way such an effort could gather any significant information would be by demanding the station save up all of its recruiting and employment decisions until there are enough to make it worth sending an FCC employee to the station to watch those decisions being made. The notion is so absurd as to not survive its own statement, and this proposal seems to fall into a familiar pattern of merely demanding "more" in response to every problem, real or perceived, without first assessing whether there is any factual or logical basis for needing "more."

D. Adding a Certification That Recruitment Preceded Hiring Is a Misguided Effort to Solve a Fictional Problem

The EEO Supporters claim that:

> In our experience, a common means of circumventing the broad recruitment obligations has been to time the dissemination of broad recruitment notices to occur after the job vacancy has already been filled through WOM recruitment. In this way, a discriminator can fool the Commission into thinking that it technically complied with the rules, even though persons reached by broad recruitment actually had no genuine opportunity to seek or obtain employment.[70]

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[68] *EEO Supporters Comments* at 3.
[69] *Lutheran Church*, 141 F.3d at 354.
[70] *EEO Supporters Comments* at 22.

Setting aside that there is no logical reason for a station to do this (since, in their example, the miscreant station manager could just as easily hire a favored Word of Mouth candidate *after* recruitment outreach occurs), the EEO Supporters have failed to demonstrate that any stations are actually engaging in this supposedly "common" activity. The Commission was already aware when it adopted its current EEO Rule that the effectiveness of broad outreach could be undercut by timing issues such as failing to leave a job open for a reasonable period of time,[71] or engaging in "sham" recruitment.[72] In the fifteen years that the Commission has been conducting EEO audits pursuant to its EEO Rule, it has audited many thousands of broadcast stations. In those audits, it has secured from broadcasters the date each employee was hired during the covered period, along with dated copies of all corresponding recruitment notices, allowing it to readily determine whether there has been any such pattern in the broadcast industry. The FCC has not found any such pattern, as evidenced by the miniscule number of EEO violations of *any type* found by the FCC since the inception of the EEO Rule.[73]

Whatever the experience of the commenters, the Commission's own experience has not supported their conclusions. As a result, adoption of this proposal is wholly unnecessary.

E. Updating the FCC/EEOC Memorandum of Understanding Is Unnecessary, As Is Auditing Employment Units Receiving Probable Cause Determinations

The EEO Supporters assert without offering a scintilla of evidence that "WOM recruitment conducted in an exclusionary manner" is the most common discriminatory practice engaged in by broadcasters and MVPDs. From this unsupported statement, the EEO Supporters proceed to argue that, because the victims of such practices cannot know they were victims, they

[71] *See, e.g*, *2002 EEO Order*, 17 FCC Rcd at 24051.
[72] *Id.* at 24067.
[73] *See NAB Comments* at 8.

cannot seek redress for their claims at the EEOC, and even if they do, the EEO Supporters assert that the EEOC cannot adequately address their harm for myriad reasons (the EEOC is not competent to address a specialized industry like broadcasting/its statute of limitations is too short/its backlog is too long/it cannot prevent future discrimination).[74] The EEO Supporters therefore claim that the FCC/EEOC Memorandum of Understanding should be modified to require the EEOC to notify the FCC whenever it makes a probable cause determination against a licensee and the FCC should then act on that preliminary determination and audit the broadcaster.[75]

As noted above, the FCC has been auditing broadcasters for fifteen years (as well as reviewing EEO performance at license renewal and Mid-Term) with the full ability to uncover this "most common discriminatory practice" in the industry. No adjustment of the Memorandum of Understanding with the EEOC is needed to do that. Moreover, as acknowledged by the EEO Supporters, probable cause determinations are not final findings.[76] Any referral to the FCC, then, forces the Commission to take evidence, make findings of fact, and ultimately adjudicate the claim on its own, while the original claim is typically being reviewed by a court, which has a far more diverse toolbox than the FCC. As the DC Circuit has said, "the FCC is not the Equal Employment Opportunity Commission ... and a license renewal proceeding is not a Title VII suit."[77]

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[74] *EEO Supporters Comments* at 25.
[75] *Id.* at 27.
[76] *Id.*
[77] *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978) (en banc).

The Commission's familiarity with the broadcasting industry and its lone Administrative Law Judge do not imbue it with the expertise and resources to adjudicate matters brought under any number of federal statutes that address various types of discrimination, including pregnancy and age, to name a few that are not even covered by the FCC's EEO Rule.[78] The FCC/EEOC Memorandum of Understanding was hammered out with the Department of Justice to make sure that it struck the right balance with respect to the constitutional and statutory authority of each agency as well as to make the best use of their respective resources and expertise. The EEO Supporters provide no basis to disturb that determination.

F. Proposing That the Commission Investigate a Discrete Type of Radio Broadcast Programming Is Impractical and Constitutionally Suspect

The EEO Supporters briefly suggest that the Commission should act on a long-pending MMTC request that the FCC open an inquiry into minority representation in radio news.[79] The EEO Supporters make no real argument to support that request, however, other than to point to an asserted racial disparity within "radio news." In response, the State Associations note that "radio news" is a completely amorphous category that would be impractical to investigate. At a small station, on-air personnel may well serve multiple functions, either simultaneously or over

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[78] *See e.g., Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 76 F.C.C.2d 86, 103 (1980), *recon. denied*, 80 F.C.C.2d 299 (1980); *aff'd sub nom. California Association of the Physically Handicapped, Inc. v. FCC*, 721 F.2d 667 (9th Cir. 1983) ("There is no realistic way the FCC can become expert about the myriad handicaps which afflict people or the design of buildings and equipment to accommodate these handicaps. Our expertise is electronic communications. Within the scope of our authority under the Communications Act, we have encouraged broadcasters and common carriers to make their services available to the handicapped, particularly the hearing impaired, and I expect to continue to do so. But our expertise in electronics is of little value in designing the work environment for handicapped individuals.") (Commr. Robert E. Lee, *concurring in part and dissenting in part, footnote omitted*).

[79] *EEO Supporters Comments* at 28.

their careers. Moreover, some news programming is produced by independent third parties or through collaborations with others, such as a local newspaper. Thus, it is not clear exactly how the FCC would fashion its investigation or of what utility it would be given that the EEO Supporters themselves demonstrate that private data on the racial and gender composition of "radio news" is already available.[80]

But, more importantly, an inquiry into how a specific type of programming—particularly news programming—is staffed would surely exceed the bounds of whatever authority the FCC might derive from its public interest mandate as set out in *NAACP v. FPC*.[81] As already discussed, the DC Circuit in *Lutheran Church* has called into question whether the FCC's public interest mandate with respect to diversity in programming could ever provide the requisite compelling interest to support race-based regulation. In doing so, the *Lutheran Church* court pointed out that the FCC has never defined what it means by "diverse programming."[82] It went on to note that any definition that was content-based would "give rise to enormous tensions with the First Amendment issues."[83] The court speculated that a more appropriate definition would encompass "fostering of programming that reflects minority viewpoints or appeals to minority tastes." Significantly, though, the court concluded: "We do not mean to suggest that race has no correlation with a person's tastes or opinions. We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them."[84] It is therefore hard to see how an inquiry into one specific type of programming, based on the racial

[80] *Id.* at 12 n.25.
[81] 425 U.S. 662, 670 n.7 (1976).
[82] *Lutheran Church*, 141 F.3d at 355.
[83] *Id.* at 354.
[84] *Id.* at 355 (footnote omitted).

composition of those who deliver that particular type of programming, could survive even modest scrutiny (or provide any useful information).

G. Routine Collection of Form 395 Data Cannot Be Squared With the *Lutheran Church* Ruling

The EEO Supporters claim:

> No broadcaster or MVPD has ever demonstrated that because it had to file Form 395, the government expected it to hire preferentially. Nor could such a claim have been made, because on its face Form 395 is not race-preferential.[85]

Yet the DC Circuit in *Lutheran Church* thoroughly disagreed with that assertion:

> As a matter of common sense, a station can assume that a hard-edged factor like statistics is bound to be one of the more noticed screening criteria. The risk lies not only in attracting the Commission's attention, but also that of third parties.[86]

The State Associations have detailed the difficulties such a proposal presents on numerous prior occasions and incorporates those extensive comments herein.[87] And by now it should be obvious that, if stations are required to submit to the FCC information on their racial and gender profiles, particularly given the Commission's past practice of then using that information to assess a station's suitability for punishment,[88] stations may reasonably feel

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[85] *EEO Supporters Comments* at 31.

[86] *Lutheran Church, 141 F.3d* at 353.

[87] *See, e.g.*, Joint Reply Comments of the Station Associations, MM Docket No. 98-204 (filed June 6, 2008); Joint Comments on FCC Form 395-B of the State Associations filed in Response to Public Notice, MM Docket No. 98-204 (filed May 22, 2008); Joint Reply to Opposition to Joint Petition for Reconsideration and/or Clarification of Third Report and Order and Fourth NPRM of State Associations in MM Docket No. 98-204 (filed September 17, 2004); Joint Reply Comments of the Named State Broadcasters Associations in MM Docket No. 98-204 (filed August 9, 2004); Joint Comments of the Named State Broadcasters Associations in MM Docket No. 98-204 (filed July 29, 2004). *See also* Letter from Richard R. Zaragoza, Counsel for the National Alliance of State Broadcasters Associations to Marlene Dortch, Secretary, Federal Communications Commission and Edward C. Springer, OMB Desk Officer, Office of Management and Budget, dated April 22, 2003.

[88] As the State Associations have made clear in prior filings, were the FCC to gather such information, it should, at a minimum, do so only on an anonymized basis so that the data cannot

unconstitutional pressure to make race-based hiring decisions.[89] Even if that were not the case, if those profiles are made public, they will be open to scrutiny by third parties who, assisted by the government's forced disclosure of that information, will then file complaints at the FCC asserting the need for investigations or enforcement actions. This risk of being subjected to FCC investigations, whether there is in fact anything to find or not, impermissibly pressures broadcasters to hire preferentially so as to avoid such expensive and draining proceedings, which in turn may have to be reported to their lenders under loan covenants, creating increased risk to a station's financing or its ability to secure refinancing.

Imposing such pressures, intentionally or not, cannot withstand strict scrutiny. The Commission has previously asked whether the fact that it publicly released data from the Form 395 prior to the *Lutheran Church* case dictates that it should continue doing so if it resumes collecting that data.[90] There is a clear distinction that mandates that the answer to this question be a resounding "no." Prior to the *Lutheran Church* case, the FCC used statistical analysis of individual stations' staff compositions to identify stations to investigate, and private parties filed

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be attributed to specific stations. *See, e.g.*, Joint Comments on FCC Form 395-B of the State Associations in Response to Public Notice, MM Docket No. 98-204 (filed May 22, 2008); Joint Reply Comments of the State Associations, MM Docket No. 98-204 (filed June 6, 2008).

[89] *See, e.g., MD/DC/DE Broadcasters*, 236 F.3d at 19, where the court wrote:

> Investigation by the licensing authority is a powerful threat, almost guaranteed to induce the desired conduct. *See Chamber of Commerce v. Department of Labor*, 174 F.3d 206, 210 (D.C. Cir.1999) (noting that agency "is intentionally using the leverage it has by virtue solely of its power to inspect. The Directive is therefore the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures"); *see also* BARRY COLE & MAL OETTINGER, RELUCTANT REGULATORS 213 (1978) (investigatory hearing before FCC "is considered by both key staff people and most commissioners almost as drastic as taking a license away").

[90] *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Third Report and Order and Fourth Notice of Proposed Rulemaking, MM Docket No. 98-204, 19 FCC Rcd 9973 (2004).

petitions to deny stations' license renewal applications citing nothing but the data in a station's Form 395. Before the Commission's practice was struck down, third parties' access to and use of the Form 395 data was consistent with the FCC's own use of that data, which the FCC believed was permissible. If the Commission were to revert to its prior practice, it would put itself in a completely untenable position, effectively outsourcing to private parties the task of imposing racial and gender quotas on broadcasters. The FCC simply cannot act on a complaint brought by a third party based on racial breakdowns of station staff where the Commission itself could not bring such an action.

CONCLUSION

For the reasons discussed herein, the State Associations respectfully request that the Commission more narrowly tailor the EEO Rule in seeking to achieve its objectives, reject the proposals of the EEO Supporters and MMTC as unnecessarily burdensome and/or unconstitutional, and eliminate random EEO audits as a redundant, unnecessary, and unproductive use of Commission and station resources.

Respectfully submitted,

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